APPENDIX A

Opinions Below

1. In the Supreme Court of Texas

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al., Petitioners,

v.

Ellis CARP et al., Respondents.

No. A-11478.

Supreme Court of Texas.

Feb. 8, 1967.

Suit against Texas state board of examiners in optometry and certain of its members for judgment declaring invalid professional responsibility rule adopted by board. Judgment adverse to plaintiffs rendered by District Court, Dallas County, Dallas A. Blankenship, J., was reversed in part and affirmed in part by Dallas Court of Civil Appeals, Fifth Supreme Judicial District, 401 S.W.2d 639, and defendants petitioned for review. The Supreme Court, Pope, J., held that rules promulgated by board of examiners in optometry prohibiting fee splitting by licensed optometrist with unlicensed person and division of fees by treating optometrist with another optometrist and practice of optometry under assumed or trade names and requiring presence of optometrist at office with which his name is identified and at which he holds himself out as practitioner were not new and in-

consistent provisions to Optometry Act and were consistent with one or more of its specific proscriptions and were valid.

Judgment of Court of Civil Appeals reversed and judgment of trial court affirmed.

Smith, J., dissented.

Crawford C. Martin, Atty. Gen., Hawthorne Phillips and John Reeves, Asst. Attys. Gen., Will Garwood and Tom Gee, Sp. Asst. Attys. Gen., Niemann & Babb, Charles N. Babb, Austin, Strasburger, Price, Kelton, Miller & Martin, Mark Martin, Dallas, for petitioners.

Price Daniel, Austin, Douglas E. Bergman, Dallas, Keith, Mehaffy & Weber, Quentin Keith, Beaumont, for respondents.

Pope, Justice.

Doctors Ellis Carp, S. J. Rogers, and N. Jay Rogers sued The Texas State Board of Examiners in Optometry and sought a declaratory judgment that the Professional Responsibility Rule adopted on December 21, 1959 by the Board was void. They also asked for a permanent injunction against the Board's enforcement of the rule. The trial court denied the relief prayed for and sustained the validity of the rule. The court of civil appeals held that although there was substantial evidence which supported the rule, the Board exceeded its delegated powers in promulgating it and therefore, the rule was invalid. 401 S.W.2d 639. In our opinion the Board did not exceed its statutory powers in promulgating the rule. We reverse the judgment of the intermediate court and affirm that of the trial court.

The court of civil appeals held that the rule was not arbitrary or capricious and that there was substantial

evidence of the relationship between the rule and the general welfare of the citizens of Texas. We too find that the rule is grounded upon substantial evidence. The necessity for such a rule was demonstrated by the general support it received from the members of the optometry profession and the professional societies and the record which abounds with evidence of the specific evils the rule was designed to correct. Some portions of the record will be mentioned and commented on in our analysis of the specific provisions of the rule.

The central question presented by the points before us is whether the Board exceeded its delegated powers in promulgating the Professional Responsibility Rule. In determining this issue, we must examine the general purposes of the Optometry Act as well as certain specific provisions of the act. The Legislature's primary purpose in passing the act was to assure and protect the personal and professional relationship between an optometrist and his patient. To make certain that this purpose was carried out, the act requires an optometrist to be licensed before he may practice within the state. The optometrist must evidence his identity and professional qualifications by registering and recording his license in any county in which he practices. Articles 4561–4562[1]; article 735 Vernon's Ann. Penal Code. He must also display his license in his office, and when he practices away from his office, he must identify himself by affixing to each bill for glasses his signature, address and the number of his license. Article 736, Vernon's Penal Code. Personal identification by those practicing any of the healing arts is of such significance that the Legislature requires a licensee to identify the particular system which his license permits him

[1] Unless indicated otherwise, all articles cited in this opinion are contained in Vernon's Civil Statutes.

to practice. Article 4556. It is in this statutory context of fixing professional identification and personal responsibility that we now examine the powers delegated to the State Board of Examiners in Optometry and the provisions of the particular statutes and the rule which the Board promulgated. Article 4556 is the source of the Board's rule-making authority. It provides:

> "• • • The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act. • • •"

Article 4563 provides that the Board of Examiners may refuse to issue a license to an applicant and may cancel, revoke or suspend any license it has granted for any of the following reasons:

> "(a) That said applicant or licensee is guilty of gross immorality;
>
> "(b) That said applicant or licensee is guilty of any fraud, deceit or misrepresentation in the practice of optometry or in his seeking admission to such practice;
>
> "(c) That said applicant or licensee is unfit or incompetent by reason of negligence;
>
> "(d) That said applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;
>
> "(e) That said applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

"(f) That said licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this State, to so practice;

"(g) That said licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;

"(h) That said licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;

"(i) That said licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this State;

"(j) That said applicant or licensee has wilfully or repeatedly violated any of the provisions of this Act."

The questioned Professional Responsibility Rule, except for its severability clause, is copied in the footnote to Texas State Board of Examiners in Optometry v. Carp, 388 S.W.2d 409, 411-412 (Tex. 1965). The footnote to the opinion of the court of civil appeals, 401 S.W.2d 639, 640-641, is a good summary of section 1 of the rule, which we adopt. Section 1 provides that no optometrist shall:

"(a) Divide, share or split fees with any lay person, firm or corporation. However, it shall not be construed a violation of the Rule if an optometrist (1) pays an employee in the regular course of employment, or (2) leases space on a percentage or gross receipts basis; and (3) he may sell or assign accounts receivable.

"(b) Divide, share or split fees with another optometrist or physician except (1) on a division of

services and (2) then only with the knowledge of the patient, but (3) the Rule will not be interpreted to prevent partnerships.

"(c) Practice under or use an assumed name in connection with his practice. However (1) partners may practice under their full or last names, and (2) optometrists employed by other optometrists may practice under their own names in an office listed in the names of their employers.

"(d) Use or allow his name or professional identity to be used on the door, window, wall or sign of any office or location where optometry is practiced unless said optometrist is actually present and practicing therein during office hours.

"(e) Practice in any office or location where any name or professional identification on any sign shall indicate that such office or location is owned, operated or supervised by any person not actually present and practicing therein during office hours.

"(f) Requirements (d) and (e) above shall be deemed satisfied if the optometrist is (1) physically present more than half the total hours the office is open for at least nine months of the year; or (2) physically present in such office at least one-half the time such person conducts, directs or supervises any practice of optometry; or (3) regularly makes personal examinations of eyes at such location or regularly directs or supervises such examinations."

Section 2 of the rule provides that the wilful or repeated failure of an optometrist to comply with any provision of section 1 shall be considered prima facie evidence that such optometrist is guilty of a violation of law, and shall

be grounds for filing charges to cancel, revoke, or suspend his license or to enjoin him from continuing such violation. Section 3 of the rule provides that if any part of the rule be held invalid, the intent of the Board was to promulgate the remainder of the rule.

The court of civil appeals in striking down the rule in its entirety, held that article 4563 and other statutes stated specific grounds for refusing or cancelling a license, that the statement of specific grounds was an exclusion of all others, and that the Legislature intended that the Board should not add new or inconsistent grounds. The authorities in support of the legal principles applied by the court of civil appeals are listed in the court's opinion. Our opinion is, however, that each provision of the rule must be separately examined to determine whether it is related to and consistent with the grounds for cancellation or refusal that the Legislature listed. In other words, the real question presented is whether the rule states new or inconsistent grounds as held by the intermediate court.

In Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957), this court sustained the validity of three rules that the Board of Optometry promulgated. These rules regulated "bait" advertising, basic competence, and corporate practice of optometry. The court held that article 4556 was a broad delegation of regulatory powers to the Board since it authorized the Board to adopt such rules as are necessary for "the regulation of the practice of optometry." The court also held that each of the rules was consistent with, related to, and implementation of one or more of the prohibited categories set out in article 4563. The Professional Responsibility Rule which is under attack prohibits five forms of practice by those licensed as optometrists, and as in Kee v. Baber, we shall examine each of the prohibited practices with reference to article 4563 and other optometry regulations.

Section 1(a) of the rule prohibits fee-splitting by a licensed optometrist with an unlicensed person. Since the Optometry Act forbids an unlicensed person to directly charge fees for optometric services, such a person cannot undermine the act by indirectly charging and collecting fees through the device of fee-splitting. The prohibition of fee-splitting with laymen is generally related to the personal and professional relationship between optometrist and patient which is requisite to the practice of optometry and is specifically related to article 4563(b) which prohibits a "deceit or misrepresentation in the practice of optometry * * *." It is related to article 4563(h) which authorizes revocation of a license when the "licensee directly or indirectly employs solicitors, canvassers, or agents for the purpose of obtaining patronage," and article 773, Vernon's Penal Code, which provides that no optometrist may "employ or agree to employ, pay or promise to pay, or reward or promise to reward any person, firm, * * * for securing, soliciting or drumming patients or patronage." It is related also to article 4563(i) since a licensee who shares his professional fees with an unlicensed person "places his license at the disposal or in the service of a[ny] person not licensed to practice optometry in this State."

Section 1(b) of the rule prohibits a division of fees by a treating optometrist with another optometrist. This section is subject to some exceptions but even then the fee-splitting is permissible only with the knowledge of the patient. This section is relevant to the same provisions of the Optometry Act as section 1(a). Section 1(b) protects the same personal and professional relationship between the optometrist and his patient and that purpose runs through the whole act. The section is relevant to article 4563(b) because the treating optometrist holds himself out to his patient as the one who is performing the services

and is to be paid upon the basis of those services. A patient who ignorantly pays optometric fees based upon elements other than service alone and which fees are paid to absentee optometrists is misled.

Section 1(c) of the rule prohibits the practice of optometry under assumed or trade names. The reason for this section is that the trade or assumed name practice, like fee-splitting, disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist. The need for section 1(c) is clearly supported by substantial evidence some of which we shall now summarize since it demonstrates the relevance of this section to the provisions of article 4563. Dr. Carp operates seventy-one offices in Texas. He advertises them under the following trade names: Luck Optical, Luck One Price Optical, Mast Optical, Mesa Optical, Mack Optical, Plains Optical, Amarillo Optical, Lubbock Optical, Panhandle Optical, and Mission Optical. From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same. He has purchased the practices of licensed optometrists and practices under their name although they are no longer associated with the respective offices in any manner. Illustrative of Dr. Carp's trade or assumed name practice is the situation that exists in Wichita Falls. Within a two-block area in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The same supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each indepen-

dently owned and operated. Similar situations exist in Dallas and El Paso. On the other hand, Texas State Optical, owned by the Doctors Rogers, operates eighty-two offices in Texas and advertises only under the one trade name. Although no trade name can be licensed to practice optometry, Texas State Optical advertises by the use of such statements as "a scientific TSO eye examination."

The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name. Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. The practice is confusing and misleading to the public. In Kee v. Baber, supra, this court upheld a Board rule which required an optometrist to separate his practice from the business operations of mercantile establishments, and did so on the grounds that it was a safeguard for the optometrist-patient relationship and would avoid confusion on the part of the public. The court there held that the rule which prohibited corporate practice of optometry was reasonably referable to article 4563(i), which prohibits placing an optometrist's license "in the service or at the disposal of unlicensed persons." Practice under a trade name is similar to practice under a corporate name which was denounced in *Kee*. Section 1(c) is also reasonably referable to article 4563(b) which prohibits "deceit or misrepresentation in the practice of optometry." See also article 738a, Vernon's Penal Code.

The practice of a profession under a trade name has often been regulated and prohibited by rules. Fisher v. Schumacher, 72 So.2d 804 (Fla.1954); Pearle Optical of Monroeville Inc. v. Georgia State Board of Examiners in Optometry, 219 Ga. 364, 133 So.2d 374 (1963); State Board of Dental Examiners v. Bohl, 162 Kan. 156, 174 P.2d 998

(1946); Silverman v. Board of Registration in Optometry, 344 Mass. 129, 181 N.E.2d 540 (1962); Toole v. Michigan State Board of Dentistry, 306 Mich. 527, 11 N.W.2d 229 (1943); State Board of Optometry v. Orkin, 249 Miss. 430, 162 So.2d 883 (1964); Strauss v. Univ. of New York, 2 N.Y.2d 464, 161 N.Y.S.2d 97, 141 N.E.2d 595 (1957); Strauss v. Univ. of New York, 282 App.Div. 593, 125 N.Y.S.2d 821 (1953); Straus Inc. v. Univ. of State of New York, 186 Misc. 242, 59 N.Y.S.2d 429 (Sup.Ct.1945); 41 Am.Jur. Physicians and Surgeons § 52 (1942); 70 C.J.S. Physicians and Surgeons §§ 31, 33 (1951).

Sections 1(d), 1(e), and 1(f) of the rule require and assure the presence of an optometrist at the offices with which his name is identified and at which he holds himself out as a practitioner. Substantial evidence was presented to prove that such rules were needed to correct the evil of misleading representations to the public. Named optometrists have been identified with scores of widely separated offices in Texas, notwithstanding the fact that they have neither practiced at nor been inside many of the places with which their names are associated. Dr. Carp has advertised and practiced under the names of Douglas Optical, Shannon Optical, Pearl Optical, Lee Optical, Lee Optical Company and Dr. L. H. Luck. Those are the names of licensed optometrists who sold Dr. Carp their locations and the use of their names but continued their practice independently of Dr. Carp.

Texas State Optical's advertising leaves the impression that one of the Doctors Rogers is present at a particular office. Actually they have neither been inside nor seen some of their eighty-two offices distributed generally over Texas. They list their names in phone books in cities where they do not purport to practice optometry and on plaques showing the names of the optometrists who serve particular of-

fices though they do not in fact practice at such offices. Since such practices are deceptive and misleading, sections 1(d), 1(e), and 1(f) are relevant to article 4563(b). Toole v. Michigan State Board of Dentistry, supra, and Campbell v. State, 12 Wash.2d 459, 122 P.2d 458 (Wash. 1942).

We conclude that the court of civil appeals erred in its holding that the Professional Responsibility Rule added new and inconsistent provisions to the Optometry Act. To the contrary, our opinion is that the rule's provisions are in harmony with the general objectives of the act and referable to and consistent with one or more of its specific proscriptions. We believe that the Legislature, by investing the Board with broad rule-making powers "[for] the enforcement of this Act" and "[for] the regulation of the practice of optometry," contemplated that the Board would use these powers to correct the evils generally classified in article 4563, or some other provision of the Optometry Act. If these rule-making powers did not authorize the Board to regulate evils not encompassed in the specific wording of the act, they would be nothing more than meaningless excess.

Respondents urge two additional reasons in support of the judgment of the court of civil appeals—the case of Southwestern Bell Tel. Co. v. Texas State Optical, 253 S.W.2d 877, (Tex.Civ.App. 1952, no writ) and the legislative history of the Optometry Act. In the *Southwestern Bell Tel. Co.* case the Doctors Rogers brought an injunction suit and compelled the telephone company to list Texas State Optical, the trade name, in the yellow pages of the Port Arthur telephone directory. At that time the Board had not yet undertaken to implement the act. The case did not come to this court, and the opinion contains a number of holdings that are inconsistent with our views expressed above. The court held that "[t]he fact that no license to

practice optometry has been issued to 'Texas State Optical' is not material." The decision reflects an absence of factual background about the evils of the trade name practice of optometry as evidenced by its holding that such practice is not against the public interest so long as the public by making a search can discover the persons using the name. We disapprove these holdings. Whether the telephone company should list an optometrist's trade name is not the same issue as that of the Board's power to make rules prohibiting practice under a trade name.

Respondents urge that the Legislature did not enact proposed legislation which would have prohibited trade name practice of optometry and fee-splitting. The argument is that the original Optometry Act, as introduced, had a provision which prohibited the practice of optometry under any name other than a licensee's own proper name and also had a provision which would have made it a penal offense to falsely impersonate any person licensed as an optometrist. Acts 46th Leg.R.S.1939, ch. 4, pp. 360–368. Before passing the bill, the Legislature deleted the sections which prohibited trade name practice, Vol. II House Journal, 46th Leg. 1939, pp. 2529–2534, and fee-splitting, Senate Journal, 46th Leg.1939, pp. 1958–1968. Respondents urge that the Legislature by deleting the prohibitions against the practices from the bill, implied an intent that such practices should be permitted. Respondents' reasoning is that "[n]o court should read into a statute by implication that which both Houses of the Legislature have expressly rejected * * *." Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S.W.2d 482 (1935).

The Legislature did not adopt specific prohibitions of trade name practice and fee-splitting; however, any implications which might be derived from that action are overcome by the Legislature's express grant of broad rule-

making powers to the Board. Kee v. Baber, supra. The Legislature expressly empowered the Board to make rules to regulate the practice of optometry and enforce the act. Rather than an implied limitation of Board powers, the act extended the powers of the Board. Instead of an implied grant of permission to practice under a trade name, the act's rule-making provision empowered the Board to make appropriate rules grounded upon substantial evidence of the evils against which the public should be protected. Gibbs v. United States Guarantee Co., 218 S.W.2d 522 (Tex.Civ.App.1949, writ ref.). In Kee v. Baber, supra, this court so treated the grant of rule-making powers and we sustained the rule which prohibited corporate practice of optometry on the reasoning that it implemented the Legislature's prohibition against placing an optometrist's license "in the service or at the disposal of unlicensed persons." On similar reasoning, the Board had the power to prohibit the same result under a different scheme. The trade name entity is no more a licensee than a corporate entity. The Board passed its rule after substantial evidence showed that a widespread practice existed in Texas which undermined sections (b), (h), and (i) of article 4563 and the general purpose of the act to identify and establish personal responsibility of the licensee. It is our opinion that the Legislature in failing to enact the specific provisions, intended instead to provide a better method for the Board to regulate the profession, and that it did this by an express authorization for the Board to tailor and make its rules for the particular needs of the profession and the public so long as they are relevant to the statutory proscriptions.

We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

SMITH, J., dissenting.

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. The Legislature provided in Article 4563 ten grounds for refusing or canceling the license of an optometrist. The rule now under attack was adopted by the Texas State Board of Examiners in Optometry. In my opinion, each of the rules' outright proscriptions has been added as a new ground to those enumerated by the Legislature for the revocation of licenses. Since the Legislature through the enactment of Article 4563 has definitely listed the reasons authorizing the Board, in its discretion, to refuse to issue a license to any applicant in the first place, and to cancel, revoke or suspend the operation of any license by it granted, any rule adopted by the Board must by its own terms be referable to or related to a specific provision of Article 4563. An examination of the specific provisions of Article 4563 and the provisions of the rules under attack leads me to conclude that each provision is an outright and independent proscription. The forbidden acts as stated in Section 1 of the rule are not by their own terms referable to or related to any specific provisions of Article 4563. On this point I can add very little to the holding of the Court of Civil Appeals, 401 S.W.2d 639. However, I do wish to emphasize that when the Legislature said to the Board that it may cancel, revoke or suspend a license for ten specific reasons, it negatived any other grounds that might have been permitted under general rule-making powers. See State v. Mauritz-Wills Co., 141 Tex. 634, 175 S.W.2d 238, 241 (1943); 41 Am.Juris. 172, Physicians & Surgeons, 44; Graeb v. State Board of Medical Examiners, 55 Colo. 523, 139 P. 1099, 1101, 47 L.R.A.,N.S., 1063 (Sup.Ct.

Colo.1913). This latter case involved a Colorado statute which assigned nine specific "acts and conduct as may justify the revocation of a license". The Court held: "[q]uite clearly the causes designated in the statute are exclusive, and the maxim, 'expressio unius est exclusio alterius,' applies. * * *"

The Board contends and this Court seems to approve the contention that the rule under attack does not add new offenses to those listed in Article 4563. Both the Board and the Court rely heavily upon our holding in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (Sup.Ct.1957). In considering and approving the *Kee* case, I was of the opinion and still maintain that the rules considered in *Kee* were specifically tied to and closely related to specific sections of Article 4563. The rules there involved were designed to implement rather than to add a new and independent rule. Our decision in *Kee* stressed the idea and, in fact, the Court found that the board rule-making powers (emphasized by the Court in the present case) were intended "to vest the Optometry Board with authority to *fill in the details relating to the proscribed actions.*" [emphasis added]. My analysis of *Kee* leads to the conclusion that this Court was not holding in *Kee* that the Board could do the proscribing itself. In our case, the Board makes no contention that the rule under attack in any manner is enacted to fill in the details or in implementation of a prospective enactment. The Board is seeking, at the hands of this Court, power to make the proscriptions in the first instance and for such rules to have the force of law just as though the Legislature had included them in the statute. I respectfully maintain that an administrative agency may not enlarge the causes for which a license may be revoked or suspended. See Cherry

v. Board of Regents of the University of State of New York, 289 N.Y. 148, 44 N.E. 2d 405 (1942). In *Cherry*, the Court held that since the New York Legislature has enumerated the reasons for suspension or revocation of licenses, the Board cannot, by adoption of rules, add to the statutorily enumerated grounds. The Court said in *Cherry*:

> "[W]e have said that the Board of Regents' 'specific supervisory powers over the practice of dentistry • • • enable it, within reasonable limits, to prescribe canons by which conduct deemed by it, in the exercise of fair judgment, to be unprofessional and objectionable may, in the interest of rescuing that profession from vulgar commercialism, be banned.' Matter of Dr. Bloom Dentist, Inc., v. Cruise, 259 N.Y. 358, 363, 182 N.E. 16, 17. The field in which that power may be exercised is nonetheless subject to restriction by the Legislature, and even within the field in which the Legislature has delegated to the Board of Regents power to prescribe canons banning conduct which it deems unprofessional and objectionable, the Board of Regents cannot by the exercise of that power enlarge the causes for which the license of a dentist may be revoked or suspended, as defined in subdivision 2 of section 1311.
>
> "• • •
>
> "[T]he bill which had been introduced in the Legislature defining the grounds for the revocation of a dentist's license included as an additional ground 'that the dentist has violated the rules of the regents governing advertising or any other rules.' That ground was stricken out before the bill was passed.

"• • • •

"[T]he Legislature has, itself, specified the grounds upon which a license to practice dentistry may be suspended or revoked. The Legislature has not delegated to the Board of Regents power to create offenses which shall furnish additional grounds."

Here again, I wish to emphasize that the Court in the present case has misconstrued its holding in Kee v. Baber, supra. We simply held in that case that the Board may enact such rules and regulations as would be consistent with the power given it under the provisions of Article 4556.

It is my position that the broad regulatory powers given to the Board in Article 4556 were to be exercised by the Board in a manner consistent with Article 4563. The Legislature has not only enumerated specific grounds for license revocations, it has also set forth detailed and specific offenses which would constitute violations of the Act. The Legislature has pre-empted the field of punishable offenses as well as grounds for license revocation. This action prevails over its general grant of power to the Board "to make such rules and regulations not inconsistent with this law as may be necessary for • • • the regulation of the practice of optometry and the enforcement of this Act."

To further demonstrate that the Board is seeking rule-making power in the field of license revocation regardless of statutory limitations, I take up its argument that the Board has the same license revocation powers as those given to the Supreme Court and the State Bar. In advancing this argument, the Board fails to distinguish between the fact that the Optometry Act enumerates the reasons for revocation of licenses, whereas the State Bar Act does not do so. Article 320a–1, Sec. 4, subdivision (a) provides:

"From time to time as to the Court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbarring attorneys at law; for the operation, maintenance and conduct of the State Bar and prescribing a code of ethics governing the professional conduct of attorneys at law. * * *"

The 46th Legislature enacted both the State Bar Act and the Optometry Act. The State Bar Act authorizes the Supreme Court to enumerate the grounds and procedures for suspension or cancellation of licenses and the means of enforcement. This is not true with the Optometry Act. Whatever its reasons for making this distinction might have been is beside the point; the fact remains that the Legislature in adopting the Optometry Act deliberately enumerated the grounds for cancellation and revocation and set up by penal statute the means of enforcement. Therefore, the Board has no authority to add new grounds and new procedures for license revocations under the general powers set out in Article 4556. See Kentucky State Board of Dental Examiners v. Crowell, 220 Ky. 1, 294 S.W. 818, 819 (Ct. of App.Ky.1927); 2 Am.Jur. 2d 130, Administrative Law § 301; Cherry v. Board of Regents of the University of the State of New York, supra.

Respondents in their conditional application for writ of error and in a supplemental brief filed herein present additional points[1] for declaring the rule under attack invalid.

---

[1] "STATEMENT OF RESPONDENTS' CROSS-POINTS

"FIRST CROSS-POINT

"The rule is arbitrary and capricious and bears no reasonable relationship to the health and wellbeing of the citizens of Texas, and the Trial Court and the Court of Civil Appeals erred in not so holding.

I think these points merit consideration. In my opinion the rule is arbitrary and capricious and bears no relationship to the health and well being of the citizens of Texas. The rule is invalid because there was no substantial evidence to support a finding that the rule bears any reasonable relationship to the public health and welfare. Respondents pleaded in the trial court that the "rule is arbitrary and capricious in that it does not have or bear any substantial relationship to the protection of the public in its dealings with persons licensed to practice optometry under the laws of the State of Texas." The Court of Civil Appeals quotes some of the evidence on this question. The record contains evidence concerning the care exercised in the selection of employee-optometrists by one of the Respondents' organizations. This evidence relates to the educational background of the optometrists selected, the fact that they were licensed by the Board and their practical experience, etc. With reference to the "Professional Responsibility" phase of the rule under attack, one of the Respondents, who is also a member of the Board, testified:

"SECOND CROSS-POINT

"The rule is invalid because there was no substantial evidence to support a finding that the rule bears any reasonable relationship to the public health and welfare, and the Trial Court and Court of Civil Appeals erred in not so holding.

"THIRD CROSS-POINT

"The rule is invalid because the same would impair the obligation of contracts in violation of both the state and federal constitutions and would take Respondents' property without due process of law, and the Trial Court and the Court of Civil Appeals erred in not so holding.

"FOURTH CROSS-POINT

"The rule is invalid because its arbitrary and capricious nature would take Respondents' property without due process of law, and the Trial Court and the Court of Civil Appeals erred in not so holding."

"Q. Now, Dr. Rogers, when a man is employed, an optometrist in your organization, do you have any standing instructions as to how he shall conduct the practice and to whom his first and primary allegiance and responsibility is?

"A. Yes, we do.

"Q. And what is that?

"A. Well, number one, the man, as I mentioned is solely responsible for his action with that patient, for his—whatever he does or doesn't do with regard to the patient and his sole allegiance, his sole responsibility, is to do what in his opinion is necessary or best or in the best interest of that patient or that patient's visual care. This is the basis upon which all of our offices operate and this is the way a man conducts himself, just as though he were in his own office."

The Board wholly failed to establish its contention that a person employed by another optometrist in a trade-name organization lacks professional responsibility to this patient. In fact this contention was refuted by the following testimony:

"Q. Now in all of your experience, Dr. Rogers, as an optometrist, and as a Board member, now something in excess of six years, I will ask you the point blank question, are optometrists practicing on a salary, or a compensatory basis, on a solely employed basis, and in a trade name organization such as yours, are they just as competent, just as sincere, just as diligent as those who practice solely or individually?

"A. Yes, I think so, I sincerely do."

The Respondent, Dr. Carp, also testified:

"Q. Doctor, let me ask you this question: As an optometrist, who is the primary responsibility of an

individual doctor associated with you in one of your offices where is his primary responsibility, to you or to the patient whose eyes he examines?

"A. By all means to the patient."

There is a complete absence of testimony given by patients or others which even remotely suggested that the care given to patients in Respondents' establishments located throughout the State was any less satisfactory to the patient, than the care given in the offices of individual practitioners. There is no evidence that the practice of optometry under trade or assumed names in multiple offices injuriously affects the public health.

It is argued that other jurisdictions have adopted rules similar to the one under consideration. Grant this is true, still the Board has made no showing that conditions were the same in each instance. There is no showing that the Legislatures in the other jurisdictions have refused to adopt the essential proscriptions contained in the rule under attack. On the other hand, it is clear that the Texas Legislature has consistently declined to include in its enactments the unconstitutional proscriptions contained in the Board rule now before us. A court cannot substitute its judgment for that of the legislative branch of the government. There is no provision of the Board's rule here involved that bears any reasonable relationship to the public welfare. It is clear that the rule is advanced for the economic protection of a particular class rather than for the protection of the public generally. There is no evidence of any *need* for the regulation insofar as the public is concerned. Simply stated, the Board has failed to discharge its burden that there was substantial evidence in existence at the time of the adoption of the rule to justify its adop-

tion. See Kost v. Texas Real Estate Commission, 359 S.W. 2d 306, (Tex.Civ.App.1962, writ ref'd). Not only has the Board failed in this regard, but more important, it has, in adopting this rule, exceeded the authority conferred upon it by law. In striking down a regulation promulgated by a Board, this Court in Teachers Retirement System of Texas v. Duckworth, 153 Tex. 141, 264 S.W.2d 98 (1954) adopted the opinion of the Court of Civil Appeals, Tex.Civ.App., 260 S.W.2d 632. The adopted language which is applicable here reads:

> "Even if it can be said that the regulation adopted by the Board making the last payment due on the last day of the month next preceding the month in which the beneficiary dies has the effect of canceling the exceptions to the common-law rule against apportionment which would otherwise be applicable to this case, we are inclined to agree with appellee that the judgment must still be sustained because, as contended by her, the Board was without power to adopt and enforce the regulation. It has been held in this State that the Board of Insurance Commissioners can exercise only the authority conferred upon it by law '* * * "in clear and unmistakable terms, and will not be deemed to be given by implication, nor can it be extended by inference, but must be strictly construed." * * *' Commercial Standard Ins. Co. v. Board of Insurance Com'rs of Texas, Tex.Civ.App., 34 S.W.2d 343, 345, writ refused. And in like manner has the power of the Railroad Commission of Texas been construed."

There is another reason which is perhaps greater than any reason thus far advanced to support the argument that

the rule should be stricken down by the courts. The rule strikes at the fundamental right of an optometrist to lawfully engage in his profession. I agree with the Respondents that the rule impairs the obligation of contracts. Not only that, it is arbitrary and capricious in nature and has been adopted without regard to the law as enacted by the Legislature and in violation of both the state and federal constitutions. The rule amounts to a taking of Respondents' property without due process of law. The rule has not been enacted for the benefit of the public, but to the contrary there is every indication that the rule has been adopted to protect the economic welfare of a few optometrists, despite the fact that the rule will place in jeopardy property rights which the Legislature has thus far chosen to safeguard. Some of the consequences of this unwarranted rule will be to prohibit the use of an assumed name in the practice of optometry and to impose strict limitations on the operation of multiple offices and the splitting of fees with employee-optometrists. The maintenance of 82 offices at many locations in Texas, at a cost of between $10,000.00 and $12,000.00 per office and at a cost of more than $1,000,000.00 in publicizing the assumed name "Texas State Optical", so far as the record shows, means nothing to the relators, but it should have some significance to this Court in deciding the question of the validity of the rule. In this connection, I repeat that there is no evidence in the record which would tend to show any public need or necessity for the rule. To the contrary, the rule arbitrarily interferes with private business in that it imposes unnecessary restrictions upon the lawful occupation of the respondents, Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

The Courts should not hesitate to intervene to protect the property rights of a citizen when it is discovered from

a record such as we have here that a Board has exceeded its powers under the guise of the exercise of the police power of the State. This Court in the case of Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 84 S.W. 648, 70 L.R.A. 850 (1905), in considering the exercise of the police power, has this to say:

> "The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation. But as the citizen cannot be deprived of his property without due process of law, and as a privation by force of the police power fulfills this requirement only when the power is exercised for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of the power rests, and into the manner of its exercise, and if there has been an invasion of property rights under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures."

This Court supported its position with a quotation from Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499 (1894) which reads:

"* * * [t]o justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

In the case of Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958), this Court held unconstitutional a statute which deprived citizens of the right to earn a living, a property right. In holding void the act there involved, we said:

"Appellants having a vested property right in making a living, subject only to valid and subsisting regulatory statutes, and being prevented from performing their business otherwise lawful but for the statute in question, we believe that we are permitted under the rule announced in Kemp Hotel Operating Co. v. City of Wichita Falls, [141 Tex. 90, 170 S.W.2d 217], supra, to order the issuance of the injunction. There it was stated that courts of equity may be resorted to for the purpose of enjoining the enforcement of a criminal statute or ordinance when same is void and when its enforcement invades a vested property right of the complainant."

The judgment of the Court of Civil Appeals should not only be affirmed, but this Court should go further and declared the rule unconstitutional.

2. In the Texas Court of Civil Appeals

Ellis Carp et al., Appellants,

v.

Texas State Board of Examiners in Optometry et al., Appellees.

No. 16669.

Court of Civil Appeals of Texas.

Dallas.

March 25, 1966.

Rehearing Denied April 15, 1966.

Suit was brought against the Texas State Board of Examiners in Optometry and certain of its members for a judgment declaring invalid the professional responsibility rule prohibiting the use of an assumed name in the practice of optometry and imposing strict limitations on the operation of multiple offices and the splitting of fees. The District Court, Dallas County, Dallas A. Blankenship, J., entered a judgment adverse to the plaintiffs, and they appealed. The Court of Civil Appeals, Dixon, C. J., held that the rule is invalid because beyond the powers delegated to the Board by the Legislature.

Reversed and rendered in part and affirmed in part.

See also, Tex., 388 S.W.2d 409.

Price Daniel, Austin, Douglas E. Bergman, Dallas, and Quentin Keith, Beaumont, for appellants.

Mark Martin, Dallas, Charles Babb, Waggoner Carr, Atty. Gen., Hawthorne Phillips and John Reeves, Asst. Attys. Gen., Tom Gee and Will Garwood, Sp. Asst. Attys. Gen., Austin, for appellees.

DIXON, Chief Justice.

This suit was filed by appellants Dr. Ellis Carp, Dr. S. J. Rogers and Dr. N. Jay Rogers against Texas State Board of Examiners in Optometry, hereinafter called the Board, and also against all but one of the members of the Board individually. Appellants pray for a judgment declaring invalid a rule adopted December 21, 1959 by the Board known as the Professional Responsibility Rule, referred to hereinafter as the Rule. Appellants also pray that the Board be permanently enjoined from enforcing the Rule. Permission for appellants to bring this action against the State of Texas was granted in Senate Concurrent Resolution No. 8, dated January 15, 1962.

Dr. N. Jay Rogers, one of the appellants, though a member of the Board, voted against the adoption of the Rule and joined other plaintiffs in bringing this suit.

The effect of the Rule is to prohibit the use of an assumed name in the practice of optometry, and to impose strict limitations on the operation of multiple offices and the splitting of fees. A summary of its provisions will be found in a footnote hereto.[1] The Rule itself is set out

---

[1] In substance the Rule provides as follows:

Sec. 1. *No optometrist shall,*

(a) Divide, share or split fees with any lay person, firm or corporation. However, it shall not be construed a violation of the Rule if an optometrist (1) pays an employee in the regular course of employment, or (2) leases space on a percentage or gross receipts basis, and (3) he may sell or assign accounts receivable.

(b) Divide, share or split fees with another optometrist or physician except (1) on a division of services and (2) then only with

verbatim in a footnote to the opinion of our Supreme Court in Texas State Board of Examiners in Optometry et al. v. Carp et al., 388 S.W.2d 409, 411 (1965).

The Doctors Rogers testified that they maintain 82 offices at numerous locations in the State of Texas. Since 1939 they have operated under the trade name, "Texas State Optical". Dr. N. Jay Rogers testified that the average cost of setting up an office is between $10,000 and $12,000. In addition they usually are obligated to pay rent of $400 or $500 per month under a lease term of normally ten years. Over a period of 24 years preceding the trial they have spent more than a million dollars to publicize their assumed name.

---

the knowledge of the patient, but (3) the Rule will not be interpreted to prevent partnerships.

(c) Practice under or use an assumed name in connection with his practice. However (1) partners may practice under their full or last names, and (2) optometrists employed by other optometrists may practice under their own names in an office listed in the names of their employers.

(d) Use or allow his name or professional identity to be used on the door, window, wall or sign of any office or location where optometry is practiced unless said optometrist is actually present and practicing therein during office hours.

(e) Practice in any office or location where any name or professional identification on any sign shall indicate that such office or location is owned, operated or supervised by any person not actually present and practicing therein during office hours.

(f) Requirements (d) and (e) above shall be deemed satisfied if the optometrist is (1) physically present more than half the total hours the office is open for at least nine months of the year; or (2) physically present in such office at least one-half the time such person conducts, directs or supervises any practice of optometry; or (3) regularly makes personal examinations of eyes at such location or regularly directs or supervises such examinations.

Sec. 2. The willful or repeated failure of an optometrist to comply with any of the provisions of Section 1 shall be considered prima facie evidence that such optometrist is guilty of violation of law, and shall be grounds for filing charges to cancel, revoke or suspend his license, or to enjoin him from continuing such violation.

Dr. Carp testified that he operates 71 offices in the State of Texas. He uses several assumed names, among them being "Lee Optical", "Luck One Price Optical", "Mack Optical" and "Mesa Optical". He employs 84 optometrists. He testified that he had spent three or four or five million dollars advertising the assumed name, "Lee Optical".

This suit was the subject of a mandamus proceeding before our Supreme Court, Texas State Board of Examiners in Optometry v, Carp, supra. The suit had gone to trial in the district court under the *preponderance of the evidence rule.* A jury was unable to agree to answers to several special issues, so a mistrial was declared. The Supreme Court in granting a writ of mandamus held that the case should have been tried under the *substantial evidence rule.* Since the facts had been fully developed and only issues of law remained to be resolved, the trial court was directed to enter an appropriate final, appealable judgment under the substantial evidence rule.

In its opinion the Supreme Court stated that there were two decisive questions of law in this case: (1) whether in adopting the Rule the Board acted within the powers delegated to it by the Legislature; and (2) if so, whether the Board's action was arbitrary, capricious or unreasonable because not supported by substantial evidence.

Following the pronouncement by the Supreme Court the district court proceeded to render judgment. The court held that the adoption of the Rule was within the lawful powers of the Board, was reasonably supported by substantial evidence, and has been in full force and effect since its adoption. It was ordered that appellants take nothing by their suit.

In their first two points on appeal appellants contend that (1) the Board in adopting the Rule exceeded the power delegated to it by the Legislature and (2) that the

Rule is inconsistent with the statute under which the Board operates. We agree with appellants and accordingly declare the Rule to be invalid and of no force and effect.

The subject of optometry is treated in our Civil Statutes in Articles 4552 to 4566–1, Vernon's Ann.Civ.St. For penal provisions see Articles 735–738a, Vernon's Ann. Penal Code.

In Article 4563 the Legislature has specifically listed the ten grounds upon which the Board in its discretion may refuse to issue a license, or may cancel, revoke or suspend a license.

The powers of the Board are set forth in Art. 4556, V.A.C.S. We quote the material part of the statute:

> "The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this act."

The cardinal rule in statutory construction is that courts should ascertain and be guided by the Legislature's intention. We recognize that Art. 4556, V.A.C.S. clothes the Board with "broad regulatory powers, many of which are somewhat discretionary in nature * * *." Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376, 378. We recognize also that the statutes relating to optometry are to be liberally construed to effectuate the purpose intended by the Legislature. Art. 10, Sec. 8, V.A.C.S. Nevertheless, a careful study of available records convinces us that it was not the intention of the Legislature to clothe the Board with the power it has exercised in adopting the Rule. In paragraphs which follow we shall state the reasons which have impelled us to this conclusion.

(1) By naming the ten grounds for refusing or canceling a license the Legislature in effect expressed its intention to exclude all others. The maxim, *expressio unius est exclusio alterius* (the naming of one thing excludes another) is applicable here. Though not conclusive the maxim has been pronounced a logical, sensible and sound rule of statutory construction. 53 Tex.Jur.2d 205-206. It has often been applied in determining the powers which have been or have not been delegated by the Legislature to administrative boards, commissions, licensing authorities and others. Commercial Standard Ins. Co. v. Board of Ins. Commissioners, 34 S.W.2d 343 (Tex.Civ.App.); Foshee Refining Co. v. State, 73 S.W.2d 1098, 1100 (Tex.Civ.App.); State v. Mapel, 61 S.W.2d 149, 152 (Tex.Civ.App.); State v. Mauritz-Wells Co., 141 Tex. 634, 175 S.W.2d 238; Ex parte Halsted, 147 Tex.Cr.R. 453, 182 S.W.2d 479, 484; Harris County v. Crooker, 112 Tex. 450, 248 S.W. 652, 655; Huntress v. State, 88 S.W.2d 636, 643 (Tex.Civ.App.); McCamey v. Hollister Oil Co., Tex.Civ.App., 241 S.W. 689 (aff. by 115 Tex. 49, 274 S.W. 562); Clark v. Briscoe Irr. Co., 200 S.W.2d 674, 682. The maxim has also often been applied in other jurisdictions. See Sutherland, "Statutory Construction", Vol. 2, p. 412, and 50 Am.Jur. 238.

(2) A principle of statutory construction closely akin to the *expressio unius* maxim is this: an administrative agency may implement and fill in details relating to statutory provisions listing or naming powers or activities granted or proscribed, but the agency may not by its own rules extend or add to the powers or activities listed in the statute. We think the principle is applicable here. In taking upon itself the task of listing in Art. 4563, V.A.C.S. the grounds upon which a license to practice optometry may be denied or canceled the Legislature plainly manifested its intention to retain such prerogative unto itself and not to dele-

gate it to the Board; and the Board lacks authority to add to the grounds named in the statute. Kelly v. Industrial Accident Board, Tex.Civ.App., 358 S.W.2d 874, 876; Teacher Retirement System of Texas v. Duckworth, 153 Tex.Civ. 141, 260 S.W.2d 632 (opinion of Court of Civ.App. adopted by 153 Tex. 141, 264 S.W.2d 98); Board of Ins. Commissioners v. Texas Employers Ins. Ass'n, Tex.Civ. App., 189 S.W.2d 47; Ketring v. Sturges, 372 S.W.2d 104 (Mo.); Golding v. Schubach Optical Co., Inc., 93 Utah 32, 70 P.2d 871.

(3) We believe the legislative intention was plainly manifested in 1953 when the Legislature rejected a proposed statutory amendment which would have prohibited the practice of optometry under an assumed name. The Beaumont Court of Civil Appeals on October 23, 1952 rendered a decision upholding the right of appellants Rogers to practice under an assumed name. Southwestern Bell Telephone Co. v. Texas State Optical, 253 S.W.2d 877 (1952), no wr. hist. In reaching its decision the court pointed out that neither under common law nor under our statutes was such practice prohibited; and that it was for the Legislature, not the courts, to change the law. The record before us shows that following this judicial decision House Bill No. 5 was introduced in the House of Representatives in 1953. The Bill as drawn prohibited the practice of optometry under an assumed name, and limited the number of offices of each practitioner to two. The Bill was rejected by the House. Thus the Legislature expressed its intention *not* to prohibit the practice of optometry under an assumed name and not to prohibit the operation of multiple offices. The rejection was all the more significant because it came with knowledge that the Beaumont court had held that in the absence of a statute forbidding it, the practice under an assumed name was not illegal.

In Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S.W.2d 482, 485, the Commission of Appeals in an opinion adopted by the Supreme Court had this to say:

"When we come to examine the legislative history of section 11 of article 911a, supra, we find that there is no escape from the conclusion that it was the legislative intent that such statute should not be construed so as to allow the insurance company to be joined in the same suit with the bus operator. When such statute, section 11, supra, which was contained in H.B. No. 50, Regular Session 40th Legislature, 1927, was pending in the Senate, an amendment thereto was offered to apply to such section. This amendment provided in express terms that the bus owner and his insurer could be sued in the same action. This amendment was duly adopted by the Senate, and was contained in the act as it originally passed that body. Senate Journal, 40th Legislature, Regular Session 1927, p. 673. Such provision was not in the act as it originally passed the House. After the act, of which section 11 is a part, was passed by the Senate with amendments, the bill was returned to the House as amended, and the House refused to concur in the Senate amendments. House Journal, Regular Session, 40th Legislature, 1927, p. 1175. The bill went to a free conference committee. The report of this committee, which was adopted by decisive majorities in both Houses, eliminated the above-mentioned Senate amendment. We think this history of the act evidences a legislative intent not to permit insurance companies under section 11, supra, to be joined in damage suits in the same action with the bus owners. Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515, 524 [70 A.L.R. 1484]."

"It is evident that section 11 of article 911a, supra, does not expressly authorize the joinder of the insurer in damage suits against the insured. If such right is held to exist, it must be put into the statute by implication. No court should read into a statute by implication that which both Houses of the Legislature have expressly rejected by decisive votes. On this question we will here quote from Judge Greenwood's opinion in Love v. Wilcox, supra: 'No court could justify putting into a statute by implication what both Houses of the Legislature had expressly rejected by decisive votes. The House and Senate Journals leave no room for doubt of the legislative intent to deny the power exercised by the State Committee in seeking to debar names from the primary ballots under the resolutions of February 1, 1930. Once the legislative intent is ascertained, the duty of the court is plain. To refuse to enforce statutes in accordance with the true intent of the Legislature is an inexcusable breach of judicial duty, because an unwarranted interference with the exercise of lawful, legislative authority.'"[3]

---

[3] After this appeal had been submitted and orally argued appellants with our permission filed a supplemental brief to which was attached an exhibit containing certified copies showing the legislative history leading up to the passage in 1939 of the optometry statutes, including Art. 4563 which lists the grounds for refusing or canceling a license to practice optometry. These statutes, according to these certified copies, had their genesis in House Bill No. 410, which as originally introduced prohibited the use of assumed names. The House Committee to whom House Bill No. 410 had been referred changed the Bill so that it specifically authorized the trade name practice. When the Bill came to the floor the House refused to pass the Bill as originally introduced, or as recommended by the Committee. Both the provision prohibiting the assumed name practice and the provision authorizing it were stricken from the Bill before it was finally passed by the House and Senate and signed by the Governor in its present form.

Appellees object to our consideration of the exhibit attached to appellants' supplemental brief because said exhibit and copies were

Appellees frequently cite and quote from the opinion in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957). In that case our Supreme Court passed on the validity of three rules adopted by the Board: (1) the "Bait Advertising Rule", (2) the "Basic Competence Rule" and (3) the "Corporate Practice Rule". It was held that these rules were valid; that the Board in adopting them did not exceed the powers delegated to it by the Legislature; that the rules were not contrary to or inconsistent with the Legislative Act; but were simply a proper attempt by the Board to *implement* the statutory provisions, especially Section (b) of Article 4563 pertaining to fraud, deceit or misrepresentation in the practice of optometry.

After a careful study of the Kee case and the three rules of the Board there under scrutiny we have concluded that the holdings there are not applicable here. The Supreme Court said that the three rules were adopted by the Board to implement and "to fill in the details relating to proscribed actions" of the statutory provisions. Since they implement but do not undertake to add to the list of statutory prohibitions listed in Art. 4563, V.A.C.S. they are not invalid. As previously stated in this opinion we think the Rule now

---

not introduced in evidence at the trial of the case. Appellees contend that we cannot take judicial notice of them. It has been held that courts will not take judicial notice of a statute that has never been enacted. Dungan v. State, 156 Tex. Cr. R. 466, 243 S.W.2d 704 (1951). In the case now before us we are construing a statute which has been enacted though not in the exact form in which it was introduced as a Bill.

The rule in nearly all jurisdictions seems to be that the courts will take judicial notice of the legislative history of enacted statutes as shown in the Legislature's journals and other official records prior to passage of the statute. 31 C.J.S. Evidence 43, p. 997; Sutherland, "Statutory Construction", Vol. 2, p. 285.

However, we need not decide the question of judicial notice in regard to the contents of the challenged exhibit, for we have reached our conclusions and our decision in this case independently of said exhibit and without considering it.

before us for consideration does attempt to add to the prohibitions in Article 4563, though the Legislature has declined to add the very prohibitions which are set out in the Rule.

Appellants' first two points on appeal are sustained.

In their third and fourth points appellants contend that the Rule is arbitrary and capricious and has no support in substantial evidence. There is no merit in these points. If the Legislature had delegated authority to the Board to adopt the Rule we would be compelled to say that the Board's action is supported by substantial evidence. The statement of facts includes nearly 3,000 pages of testimony of many witnesses plus numerous exhibits. We declare the Rule invalid only because the Board in adopting it acted beyond the powers delegated by the Legislature. Appellants' third and fourth points are overruled.

The substance of appellants' points five, six, seven and eight is that the Rule violates both the Federal and State Constitutions because it impairs the obligation of contracts, takes or destroys appellants' property without due process, bears no reasonable relationship to the health and well-being of the citizens of Texas, is retroactive in its legal effect and permits the Board to delegate unlawfully its rule-making powers to outsiders (members of the profession of optometry).

If the Rule is unconstitutional it is only because (as we have held) in adopting it the Board exceeded the powers which the Legislature delegated to it. It is not unconstitutional for the reasons urged by appellants. It has long been settled that legislative bodies and administrative agencies with proper delegation of authority may regulate professions and businesses under the police power. Texas State Board of Examiners in Optometry v. Carp, Tex., 388 S.W.2d

409; Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376; Housing Authority of City of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 130 A.L.R. 1053; Texas Nat'l Guard Armory Board v. McCraw, 132 Tex. 613, 126 S.W.2d 627; Sherman v. State Board of Dental Examiners, Tex.Civ.App., 116 S.W.2d 843; Turner v. Bennett, Tex.Civ.App., 108 S.W.2d 967; International & G. N. R. Co. v. Railroad Commission of Texas, 99 Tex. 332, 89 S.W. 961; Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694; Lewis v. Michigan State Board of Dentistry, 277 Mich. 334, 269 N.W. 194; Williamson v. Lee Optical of Okla., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. Points five, six, seven and eight are overruled.

Appellants ask for but the trial court denied an injunction. Though we have declared the Rule invalid we see no occasion for the issuance of an injunction. The question of injunctive relief will arise only if and when the Board undertakes to enforce the Rule.

Because we believe that the Board exceeded its delegated powers in adopting the Rule we reverse the trial court's judgment and here render judgment declaring the Rule invalid and of no force and effect. The court's refusal to grant an injunction is affirmed.

Reversed and rendered in part and affirmed in part.

3. In the Supreme Court of Texas, on Writ of Mandamus (1965)

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al., Relators,

v.

Ellis CARP et al., Respondents.

No. A-10258.

Supreme Court of Texas.

Feb. 17, 1965.

Rehearing Denied April 7, 1965.

Original mandamus proceeding. The Supreme Court, Steakley, J., held that where action for declaratory judgment as to validity of professional responsibility rule adopted by state board of examiners in optometry had been fully developed in trial court and attack on rule involved only questions of law, and trial judge was mistaken in his belief that answers by jury to specific issues which he submitted were essential to rendition of judgment, the case was ripe for judgment and writ of mandamus was available to compel rendition of judgment.

Decision in accordance with opinion.

Smith, J., dissented.

Waggoner Carr, Atty. Gen., Austin, John Reeves, Asst. Atty. Gen., Tom Gee and Will Garwood, Sp. Asst. Attys. Gen., Strasburger, Price, Kelton, Miller & Martin, Dallas, Niemann & Babb, Austin, for relators.

Douglas E. Bergman, Dallas, Quentin Keith, Keith, Mehaffy & Weber, Beaumont, Jake Jacobsen, C. K. Richards, Austin, for respondents.

STEAKLEY, Justice.

This is an original mandamus proceeding. Relators are the Texas State Board of Examiners in Optometry, and others.[1] Respondents are Honorable Dallas Blankenship, Judge of the 101st Judicial District Court of Dallas County; Ellis Carp, a licensed optometrist practicing under various assumed names, including Lee Optical, Luck Optical, One Price Optical, Douglas Optical, Plains Optical, Mesa Optical, Mast Optical; and S. J. Rogers and N. Jay Rogers, licensed optometrists practicing under the assumed name of Texas State Optical.

Relators seek the extraordinary writ to require Judge Blankenship to set aside his order declaring a mistrial in Cause No. 69,448-E, pending in the 101st Judicial District Court of Dallas County, styled Ellis Carp et al. v. Texas State Board of Examiners in Optometry, and further commanding Judge Blankenship to enter a final and appealable judgment determining the validity or invalidity of the Professional Responsibility Rule adopted by the Board and under attack in the suit.

---

[1] Drs. Carl R. Cathey, Robert E. Day, John E. Finn, B. R. Friedman, Harvey McCord, M. D. Monaghan, Don Montgomery, John S. Morgan, Frank V. Swanson, Jr., Bruno Theis, O. Reynolds Young, all of Dallas County; and Thomas G. Beall, Collin County; S. C. Scarbrough, Kaufman County; and E. U. Sprinkle, Hunt County.

The Board is an administrative agency of the State of Texas created under the provisions of Article 4553, Revised Civil Statutes of Texas, 1925. It is authorized by Article 4556 "to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry, and the enforcement of the Optometry Act." On December 21, 1959, the Board adopted what is entitled the Professional Responsibility Rule, the relevant provisions of which are quoted in the footnote.[2] Respondents

---

[2] "In order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship, the following rule is hereby adopted by the Texas State Board of Examiners in Optometry on the 21 day of December, 1959

"Section 1. No optometrist shall:

"a. Divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to prevent an optometrist from paying an employee in the regular course of employment, and provided further that it shall not be construed as a violation of this rule for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

"b. Divide, share, split or allocate either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility and then only after the patient paying the fee has full knowledge thereof, provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry.

"c. Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice

Carp and Rogers immediately attacked the Rule by suit in the nature of a declaratory judgment action, since which time the Board has been under successively issued court orders restraining the enforcement of the Rule.

---

in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one (1) year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Article 4563, as amended, Revised Civil Statutes of Texas, whichever period shall be the longer.

"*d.* Use, cause or allow to be used after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, his name or professional identification, as authorized by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

"*e.* Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

"*f.* The requirement of subparagraphs *d* and *e* above that an optometrist be 'actually present' in an office, location or place of practice holding his name out to the public shall

It is necessary to describe only briefly the various proceedings and legal maneuvers of the parties preliminary to the events in court which brought about this mandamus proceeding. The suit attacking the Rule was placed on the jury docket upon the motion of Respondents Carp and Rogers. A pre-trial hearing was held on September 12, 1963, at which the Respondent Judge Blankenship overruled the motion of the Board to strike the cause from the

---

be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

"(1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

"(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry. Provided that this rule shall not be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily:

The requirement of subparagraphs *d* and *e* above that an optometrist be 'practicing optometry' at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office, location or place of practice such examinations.

"Section 2. The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of Section 1 above shall be considered by the Texas State Board of Examiners in Optometry to constitute prima facie evidence that such optometrist is guilty of violation of Chapter 10, Title 71, as amended, of the Revised Civil Statutes of Texas, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the Board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoining the violation of any of the preceding rules."

jury docket and that the case proceed to trial before the court with the issues to be determined as matters of law under the substantial evidence rule. Parenthetically, it may be noted that at all proper times in the course of the subsequent trial the Board reasserted this position by proper motions, all of which were in turn overruled.

Trial commenced on October 21, 1963, and continued until November 13, 1963. The court submitted twelve special issues to the jury inquiring, in brief, if the members of the Texas Optometric Association, Inc. entered into a conspiracy with a majority of the members of the Board to use powers of the Board to prohibit the practice of optometry under trade or assumed names and multiple offices; if enforcement of the Professional Responsibility Rule resulted in the stifling of competition in the practice of optometry; if the persons conspiring, if such were found, did so for the purpose of stifling competition in the practice of optometry between Relators and Respondents; if enforcement of the Professional Responsibility Rule would increase the cost of spectacles; if the persons conspiring, if such were found, did so for the purpose of increasing the cost of spectacles; if the Relator Board acted arbitrarily in adopting the Rule; if enforcement of the Rule will lessen competition; if the Rule was necessary in the regulation of the practice of optometry by the Board; if the Board was not acting in good faith for the purpose of regulating the practice of optometry in adopting the Rule; if there were no reasonable relationship to the protection of the public health and welfare of the citizens of Texas; and if in the adoption of the Rule the Board followed the procedure set out in its "rule-making procedure rule."

After lengthy deliberation the jury announced in open court that it was unable to agree on answers to any of the issues. The jury was discharged on November 13, 1963,

and on November 14, 1963, the Relators filed a motion for the court to proceed to judgment and to the entry of judgment. On May 25, 1964, Judge Blankenship overruled this motion of Relators and declared a mistrial. This mandamus proceeding resulted.

Respondents present two points. They are, first, that "The writ should be denied because of the failure of the Relators to seek substantially the same relief in the Court of Civil Appeals."; and, second, "Granting the validity of the Rule is to be determined as a question of law, the Trial Court has authority to determine from a preponderance of the evidence the issue of conspiracy in restraint of trade."

Respondents Carp and Rogers variously assert they "injected a fact issue of 'conspiracy' in the declaratory judgment proceeding, and in so doing raised the issue that acts of an official not lawfully authorized are not acts of the State."; that "the Rule was not adopted in good faith for the purpose of protecting the public health and well-being, but upon the contrary as a result of a conspiracy between the individual Board members (who were also members of Texas Optometric Association) and the other members of TOA for the purpose of destroying competition then being experienced by such conspirators."; "that the rule was the product of the conspiracy, and was therefore invalid."

The allegations of these Respondents upon which the foregoing rest are copied in the footnote.[3]

---

[3] "Your Plaintiffs now allege that said 'Professional Responsibility Rule' was not adopted in good faith by the said Defendant Board for the purpose of protecting the health and well-being of the citizens of the State of Texas, but, on the contrary, was adopted by the Defendant Board (your Plaintiff, N. Jay Rogers, dissenting therefrom) for the avowed purpose of injuring your Plaintiffs and

The issue in the suit in the district court is the validity of the Professional Responsibility Rule promulgated by the Board. The issues in this mandamus proceeding are whether the determination of such issue in the district court presents only questions of law, and, if so, whether this Court should direct the district court—Respondent Judge Blankenship—to proceed to judgment, either sustaining or invalidating the Rule upon the basis of the trial record made before him.

---

all other optometrists similarly situated in the State of Texas by so limiting and reducing, if not destroying, the practice of your Plaintiffs as competitors of the members of the Texas Optometric Association, Inc., of which all but one of the members of the said Board is also a member. In this connection your Plaintiffs now allege that said 'Professional Responsibility Rule' was not adopted in good faith for the purpose of regulating the practice of optometry, but for the sole and avowed purpose of destroying competition between the individual members of the said Board and those whom they represent as members of the Texas Optometric Association, Inc., and your Plaintiffs and other licensed optometrists similarly situated.

"Plaintiffs further show unto the Court that the said Board, and the individual members thereof, save and except N. Jay Rogers, have in the past been guilty of participating in fictitious and collusive lawsuits wherein said Board would undertake to co-operate with a willing plaintiff in an ostensible test of the rules promulgated by the said Board, and plaintiffs now show unto the Court that the Defendants, their agents, servants, attorneys and employees, have filed numerous lawsuits in connection with the rules heretofore promulgated by the Board, which such suits were to all intents and purposes fictitious in that same were not arms-length litigation in which the validity of such rules in controversy were bona fide and legitimately debated and argued before the respective Courts; that such Defendants have conspired in the filing of such suits with fellow members of the said Texas Optometric Association, Inc., to bring such suits against the Board; and the same have been tried upon agreed Statements of Fact prepared by the attorney for the Board, and with both parties desiring a favorable ruling on the validity of the respective rules involved, thus circumventing a full and open hearing on such matters between parties bona fide contesting the power and authority of the Texas State Board of Examiners in Optometry so to enact such rules; that such actions on the part of the Defendants effectively prevent Plaintiffs and others

It was recognized long ago that in reviewing acts of administrative agencies the courts are not to investigate the methods they adopt or the motives or purposes which prompt their action. Railroad Commission of Texas v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S.W. 573, 580 (1912). The legal effect of the administrative act upon the parties affected is the judicial inquiry. Railroad Commission of Texas v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.2d 967 (1937). Where, as here, the administrative action is quasi-legislative in nature, and apart from

---

similarly situated from appearing and contesting such action on the part of the Defendants and effectively deprive Intervenors of their day in Court and the protection of their property rights and, consequently and by virtue of such acts, does not constitute due process of law and is in violation of Plaintiffs' constitutional rights, in that such controlled litigation is unknown to them until same reaches the Appellate Courts of this State on a Record and Statement of Facts which have been agreed upon between the co-conspirators; And, by reason of the foregoing facts alleged under oath, the District Court of Dallas County, Texas, in the exercise of its equity power and jurisdiction has temporarily restrained and enjoined said Defendants from so conspiring in the future.

"Plaintiffs now allege that it was the avowed purpose of the individuals composing the Texas State Board of Examiners in Optometry (exclusive of your petitioner N. Jay Rogers, who voted against the adoption of the 'Professional Responsibility Rule'), to adopt the same so as to eliminate competition which the members of the Texas Optometric Association, Inc., and the said individuals composing said Board, individually and not as officials, were experiencing in their practice; that said rule was not promulgated in good faith for the purpose of protecting the public (for it does not accomplish such purpose) but was adopted with the ulterior and invidious motive of using their public office for private gain through the destruction of their competition.

"Your Plaintiffs now allege that the adoption of the 'Professional Responsibility Rule' was done by a majority of said Board after it had been pointed out to said Board that the effect of the adoption of such rule would be tantamount to the destruction of the practice of your Plaintiffs; Nevertheless, the said individual board members, purporting to act in their official capacity, but motivated solely by their own selfish interests and the selfish interests and desires of the Texas Optometric Association, Inc., proceeded with the adoption thereof."

the question of corruption in its inception, its review by the judiciary is constitutionally limited to a determination of questions of law, i.e., whether the action is within the powers delegated to the agency and, if so, whether the action is arbitrary, capricious or unreasonable because not reasonably supported by substantial evidence. Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957); Hawkins v. Texas Co., 146 Tex. 511, 209 S.W.2d 338 (1948); Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946); Thomas v. Stanolind Oil & Gas Co., 145 Tex. 270, 198 S.W.2d 420 (1946).

Respondents appear to acknowledge the foregoing by their statement in their Point No. 2 that "granting the validity of the Rule is to be determined as a question of law * * *." What Respondents seek to assert is an additional type of attack against the order here, namely, that it is the product of a conspiracy in restraint of trade as to which there are fact questions to be decided by the preponderance of evidence standard. This Court in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957), in which three similar rules of general application promulgated by the Optometry Board were likewise under attack, recognized that broad regulatory powers, many of which are discretionary in nature, are delegated to the Board.* We said of that controversy:

> "It is not inaccurate to describe this as a dispute between two groups of optometrists, one of which emphasizes the merchandising factor of the profession or occupation and contends that the cost of suitable glasses for the using public may be greatly reduced by

---

*Respondent Carp intervened in Kee v. Baber attacking the rules there considered on the basis of similar allegations of conspiracy; however, the issue drawn thereby was put aside by stipulations of the parties.

eliminating numerous unnecessary steps and practices which are insisted upon by the opposing group who regard such procedures and regulations as necessary to safeguard the public health. To our minds this basic conflict in Texas has been resolved by the Legislature and the optometrists themselves in favor of the group favoring strict regulation essentially by the profession itself."

We also said:

"Optometry has been classified by the Legislature as a profession and as such subject to a degree of self-regulation. As is the case of most professions, a certain proportion, generally a majority group, in a sense do tell the other members of the profession 'how to run their business.' This is a necessary adjunct or burden of regulation which the Legislature has deemed necessary to prescribe in order to safeguard the public health and welfare."

That a similar professional dispute is here involved is evident from the allegations of Respondents Carp and Rogers in their suit attacking the Professional Responsibility Rule.[5] Article 4553 requires that members of the

[5] "Plaintiffs allege that there are several hundred optometrists practicing in the State of Texas and that through the years said optometrists have generally divided themselves into two groups, although each member of both groups is duly licensed to practice under the laws of the State of Texas. One of said groups is composed of those persons who have banded themselves together under the name of 'Texas Optometric Association, Inc.,' a corporation. The members of said corporate association are generally single practitioners who do not practice under a trade or assumed name and who ordinarily do not operate more than one optometric establishment. This group, acting through its corporate association, as aforesaid, had generally assumed to speak for all of the optometrists licensed to practice in the State of Texas, whether members or non-

Board "shall possess the necessary qualifications to practice optometry." Those appointed to serve on the Board, as is true of all administrative agencies, necessarily bring their individual professional viewpoints with them. These may or may not be shared by either a majority of the Board, or by a majority of the profession itself. But the members of the Board having the same professional objectives will necessarily join together in acting upon rules

---

members of said association. On the other hand, there is a large group of licensed optometrists who have adopted a different approach to the practice of optometry and engage in the practice thereof under trade or assumed names and in multiple offices or establishments. During the past decade there has been a great deal of litigation within the State of Texas between members of the two opposed groups (all parties hereby being thoroughly and completely familiar with each specific piece of litigation), and the practitioners who belong to the 'Texas Optometric Association, Inc.,' have been successful, generally, in procuring the appointment to the Defendant Board of a majority of persons who are members of said 'Association' and who have endeavored by reason of their official position to accomplish the ultimate objects of said private association. Throughout the years said 'Association' has, through the agency of the Board, constantly sought to adopt rules or procure passage of legislation which would prevent the practice of optometry under trade or assumed names or in multiple establishments. Being unsuccessful in procuring the passage of legislation, said members of said 'Association' who have become members of the Defendant Board have, under the guise of the adoption of official rules and regulations, including the 'Professional Responsibility Rule,' attempted to outlaw the practice of optometry under trade or assumed names and in multiple establishments, notwithstanding the fact that such is and was and will continue to be, until the Legislature acts to the contrary, a lawful method and means of practice. As an example of the activities of the said Board, acting ostensibly as the Texas State Board of Examiners in Optometry, but in truth and in fact as a tool and agency of the Texas Optometric Association, Inc., purported to adopt on or about December 21, 1959, the so-called 'Professional Responsibility Rule,' purporting to govern the practice of optometry in the State of Texas. Your Plaintiffs attach hereto and incorporate herein by reference said Rule, as fully as if set out herein in haec verba, but in so doing your Plaintiffs do not admit the validity of said 'Professional Responsibility Rule' or any part thereof."

and regulations to govern the profession, and those in the majority will prevail. The views thereby translated into governing regulations will coincide with the views of others, and perhaps a majority, of the profession. But this is not unlawful conspiracy; it is neither unlawful in itself nor is it the accomplishment of a lawful objective by unlawful means. Cf. State v. Standard Oil Co., 130 Tex. 313, 107 S.W.2d 550 (1937). The invalidation of an administrative order apart from, and regardless of, its validity as a matter of law when measured by the standard of the substantial evidence rule requires a showing of circumstances under which it would be shocking to the judicial conscience to permit the order to stand. This requires, in turn, a showing of conditions comparable in seriousness to corruption, fraud, dishonesty or bribery in the promulgation of the administrative order. This is not alleged here, and there is no contention that such is shown by the evidence in the trial of the case. It is in the public interest that orders of administrative agencies shall not stand when they are the product of sinister acts and deeds which shock the judicial conscience. But fearless administration is also in the public interest, and this is strengthened when administrative agencies are given protection against harassment or intimidation by suits which do not meet the test we have indicated.[g]

The issues submitted to the jury in this case, previously reviewed in the forepart of this opinion, illustrate the fore-

g. An affirmative answer to all of the issues would not

---

[g] Compare the reasoning supporting the rule of federal and state jurisdictions that public officials are immune from tort liability even when it is alleged that they acted maliciously, See Sanders State Bank v. Hawkins, 142 S.W. 94 (Tex. Civ. App. 1911); Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896); Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949); Davis, Administrative Law Treatise, Ch. 26, §§ 26.01 et seq.

afford a basis for its invalidation, assuming the validity of the Rule when subjected to the substantial evidence standard. If the Rule was enacted within the powers vested in the Board by the Legislature, and if reasonably supported by substantial evidence, there can be no unlawful conspiracy in the fact, if it be a fact, that a majority of the Relator Board joined in promulgating the Rule, and in using the powers of the Board to prohibit the practice of optometry under trade or assumed names and by means of multiple offices. Nor is the Rule rendered unlawful because it will lessen competition and increase the cost of spectacles. The Board cannot have acted arbitrarily if it acted within its powers and if its action is reasonably supported by substantial evidence. Its motives are not the subject of judicial inquiry. The question of whether or not there is a reasonable relationship in the promulgation of the Rule to the protection of the public health and welfare of the citizens of Texas is one of law, i. e., whether or not the Board exceeded its statutory powers in promulgating the Rule.

This charts the proper trial course of the suit to which this proceeding relates. The attack by Respondents Carp and Rogers upon the Professional Responsibility Rule involved only questions of law. Article 1734, Vernon's Annotated Texas Statutes, authorizes this Court to issue the writ of mandamus " * * * to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and usages of law * * * " In point by analogy are the decisions that the writ of mandamus is available to compel the rendition of a judgment by the trial court upon a special issue verdict, as well as a general verdict. Lloyd v. Brinck, 35 Tex. 1 (1872); Gulf, C. & S. F. Ry. Co. v. Canty, 115 Tex. 537, 285 S.W. 296 (1926); Cortimeglia v. Davis, 116 Tex. 412, 292 S.W. 875 (1927); South-

land Greyhound Lines, Inc. v. Richardson, 126 Tex. 118, 86 S.W.2d 731 (1935). In these cases the action taken by the trial court involved a determination of whether there was conflict in the findings of the jury with respect to any fact essential to the rendition of a final judgment. This determination was not regarded as an exercise of a judicial function by the trial court such as would defeat the writ of mandamus. It was stated in Cortimeglia and reiterated in Southland Greyhound Lines, Inc.:

> "'The judge of the court, however, has no arbitrary right to refuse to enter judgment on a verdict which constitutes a finding on all the facts tendered in the pleadings necessary to the rendition of judgment. And, when it appears from the verdict itself and the order refusing to render and enter judgment thereon that such refusal is arbitrary and not based on the exercise of discretion, mandamus will lie to require entry of judgment. In such case the action of the judge is in effect a refusal to proceed to judgment in the trial of the cause.'"

So it is here. The case has been fully developed in the trial court and is ripe for judgment. The trial judge was mistaken in his belief that answers by the jury to the special issues which he submitted were essential to a rendition of judgment, just as in an occasional case a trial judge may be mistaken in his belief that there is conflict in the jury findings. In such instances a judgment should be rendered, and such action may be compelled by mandamus. The writ in no way controls the judicial discretion of the Respondent judge. It does not direct that he enter a particular judgment for a certain party but only that he proceed to judg-

ment.[1] The circumstance that the jurisdiction of the Court of Civil Appeals was not first invoked does not defeat the jurisdiction of this Court. State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939); Hidalgo County Water Improvement District No. 2 v. Blalock, 157 Tex. 206, 301 S.W.2d 593 (1957); See also Yett v. Cook, 115 Tex. 175, 268 S.W. 715 (1925).

We express no opinion by inference or otherwise upon the question of whether the action of the Board in promulgating the Professional Responsibility Rule was beyond the powers delegated to the Relator Board or was arbitrary, capricious or unreasonable because not reasonably supported by substantial evidence. These are questions of law to be initially determined by the Respondent trial judge and are not before us in this mandamus proceeding.

We are confident that the Respondent trial judge will proceed in accordance with this opinion without the necessity for an actual issuance of the writ of mandamus.

SMITH, J., dissenting.

POPE, J., not sitting.

SMITH, Justice (dissenting).

I respectfully dissent. The Court has, in effect, held that the Respondents failed to plead in the trial court facts sufficient to show that the individual members of the Board entered into a conspiracy for the purpose of destroying competition between the individual members of the Board

---

[1] Compare the cases where the entry of judgment on the pleadings or upon a motion for instructed verdict is sought to be compelled. Yantis v. McCallum, 121 S.W.2d 610 (Tex. Civ. App. 1938, original proceeding); American Bottling Company v. Briggs, 232 S.W.2d 103 (Tex. Civ. App. 1950, original proceeding).

and those whom they represent as members of the Texas Optometric Association and the Respondents. My position, simply stated, is this: If the pleadings alleged, and there was some evidence to support an allegation that the Professional Responsibility Rule under attack was not enacted in good faith for the purpose of protecting the public health and well-being, but was the result of an actionable conspiracy entered into between the individual members of the Texas State Board of Examiners in Optometry, or if such issue or issues were tried by consent, the trial judge's action in submitting the issues of conspiracy to a jury for determination was in the exercise of his judicial discretion, and this Court is without authority, in mandamus proceedings, to control the exercise of such discretion.

This is not a proceeding brought solely to test the validity of the rule, but the question is whether the pleadings and the evidence raise issues of fact to be submitted to the trier of the facts in a trial de novo, to be determined by a preponderance of the evidence rather than the substantial evidence rule. In this connection, it should be stressed that the validity or invalidity of the rule is not before this Court.

In my opinion the legal effect of the pleadings was to charge that the individual members of the Board had entered into a conspiracy, which is an actionable conspiracy under the anti-trust laws of the State. These acts, if committed, were unlawful acts of officials, hence not acts of the State. Therefore, the issue was properly tried under the preponderance of the evidence rule. See Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709, 172 A.L.R. 837 (1945).

In discussing or relating the allegations of fact contained in the pleadings of both the Relators and the Re-

spondents, I wish to make it clear that my comments are in no way to be construed as an expression of an opinion as to how the trier of the fact issues, whether raised by the pleadings and the evidence or tried by consent, should answer the issues.

The pleadings are voluminous and the statement of facts consists of some three thousand pages. I have read the pleadings but not the statement of facts, therefore, I do not propose to second guess the trial court as to the evidence but rather choose to think that it was the considered opinion of the trial court that the evidence which had been adduced before the court and jury in a regular trial was sufficient to raise an issue of fact on the question of conspiracy.

The Court does not reach the question of evaluation of evidence, but holds that the pleadings fail to allege an unlawful conspiracy and that the acts charged against the individual members of the Board were neither unlawful in themselves nor did such alleged acts bring about the accomplishment of a lawful objective by unlawful means. The allegations in Respondents' pleadings show a studied design on the part of the members of the Board (except Rogers) to pass a rule (the rule under attack), which exceeded statutory authority and would ultimately destroy the business of their competitors. Furthermore, it was alleged that these Board members were also members of the Texas Optometric Association, an organization with a philosophy diametrically opposed to the business methods successfully and lawfully used by the Respondents in the operation of their profession as optometrists. It was alleged that by virtue of the conspiracy, the Board members had, in effect, abdicated their official positions and were acting for their own personal gain and that of their fellow

conspirators, the Texas Optometric Association. It was alleged that the Board members (except Rogers) paved the way for such accomplishment by the adoption of another rule known as the "Rule Making Procedure Rule."[1] The petition alleges that the "Rule Making Procedure Rule" was implicitly followed in the adoption of the "Professional Responsibility Rule," and that both rules were unlawfully promulgated for the "sole purpose of hindering and destroying the competition which said Board members, in their individual capacities, and members of the Texas Optometric Association, Inc., may encounter in their personal and day to day activities in their practice of optometry."

The pleadings further alleged that the effect of the rule, which they claim was adopted to destroy competition, would

---

[1] "RULE MAKING PROCEDURE. In making rules and regulations for the regulation of the practice of optometry pursuant to Article 4556, Revised Civil Statutes of Texas, the Board shall prepare and propose such rules and regulations and submit by mail a copy of each such rule and regulation, as well as all other such rules and regulations as may have been proposed and filed with the board, supported by a petition signed by at least twenty-five per cent (25%) of the optometrists licensed by and practicing in the State of Texas, in ballot form to each optometrist licensed by and practicing in the State of Texas for a vote thereon. At the end of thirty (30) days from the time such ballots are mailed, the board shall count the ballots that have been returned; provided that no election shall be valid unless a minimum of fifty-one per cent (51%) of the optometrists licensed by and practicing in the State of Texas shall have voted at the election at which such rule or rules are voted on; and each and all of such rules and regulations that have received two-thirds of the votes cast shall be by said board declared as approved (page 67) by the profession. The fact that any rule or regulation is approved by the profession itself shall be considered by the board as prima facie evidence that such rule or regulation is reasonable and necessary for the regulation of the practice of optometry in Texas. No rule or regulation for the regulation of the practice of optometry shall be made by said board that has not received two-thirds of the votes cast in the manner above provided."

"be tantamount to the destruction of the practice of your Plaintiffs; nevertheless, the said individual Board members, purporting to act in their official capacity, but motivated solely by their own selfish interests and the selfish interests and desires of the Texas Optometric Association, Inc., proceeded with the adoption thereof."

The trial court defined, in its charge to the jury, civil conspiracy in these words:

> "You are further instructed that a civil conspiracy is a combination of two or more private persons, firms or associations by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means."

This is a correct definition and one that has been approved by the courts. See Bartelt v. Lehmann, Tex.Civ.App. (1947), 207 S.W.2d 131, 132, wr. ref.

Pursuant to Article I, Section 26, of the Constitution of Texas, our Legislature adopted Article 7429, Vernon's Annotated Civil Statutes, which reads:

> "Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal."

It is not in accord with the Constitution of Texas and the laws of Texas to condone the selfish acts of one group of a certain profession which would lead to the destruction of the practice and the elimination of the competition of another group engaged in the same profession.

The Court says that in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957), this Court recognized that "* * * broad regulatory powers, many of which are somewhat discretionary in nature, are delegated to the * * * Board * * *."

The Court, however, overlooks the statement in Kee v. Baber, which distinguishes that case from this. In Kee v. Baber, we said:

> "The gravamen of appellants' attack upon the three rules in question are that they are *inconsistent* with the provisions of Article 4563. We do not so regard them. The provisions of the legislative enactment are broad and general in scope. An intention to vest the Optometry Board with authority to fill in the details relating to the proscribed action by members of the profession is indicated. * * *"

Although the Court in the present case points out that Respondent Carp intervened in Kee v. Baber and attacked the rules there under consideration "on the basis of similar allegations of conspiracy," and that the issue of conspiracy was "put aside by stipulations of the parties," the Court now cites Kee v. Baber as authority for its holding that no conspiracy has been pleaded.

The Court dismisses the conspiracy charge in this case by observing that this is just a professional dispute and that a rule has been adopted which happens to please the members of the Board (except Rogers) and the members of the Texas Optometric Association, Inc., a corporation, its members allegedly having been unlawfully given the authority to finally, in effect, enact the rules for the Board to follow. The conspiracy charges are more serious than the Court seems to realize.

The trial court held the pleadings alleged a conspiracy in restraint of trade, and the trial court was of the opinion that there was *some* evidence showing that a conspiracy produced the rule in order to stifle competition in the sale of eyeglasses. Whether it was urged that there was no evi-

dence of conspiracy or whether the trial court was doubtful as to the sufficiency of the evidence to raise a fact issue is immaterial. The fact remains that the trial court, in the exercise of its discretion, overruled all objections offered by Relators and submitted issues inquiring if the *individual* members entered into a conspiracy with the Texas Optometric Association to use the powers of the Board to prohibit the practice of optometry under trade or assumed names; inquiring if the enforcement of the rule would "result in the stifling of competition in the practice of optometry between those same persons and your plaintiffs (Respondents)." The jury was asked to find if such conspiracy (fraud) was for the purpose of stifling competition.

In none of the cases cited by the Court which involved Railroad Commission orders were there pleadings that the individual members of the Railroad Commission had entered into a conspiracy with one group to stifle competition between that group and another group engaged in the same business. The Relators have failed to show a clear abuse of discretion by the trial court. They have failed to show a clear right to the writ of mandamus. Therefore, the application for the extraordinary writ of mandamus should be denied.

Clearly the objections to the pleadings, and the Relators' motion for instructed verdict presented questions which required the exercise of discretion by the trial judge. Mandamus will not lie to compel the performance of an act of a judge involving judicial discretion. State Board of Insurance v. Betts, 158 Tex. 83, 308 S.W.2d 846, 847 (1958); Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648, 85 A.L.R.2d 1 (1958). In Iley it was held that this court will not issue writs of mandamus to control or revise the exercise of dis-

cretion by trial courts in the performance of purely judicial as distinguished from ministerial acts.

In the Betts case, supra, it was said that this Court is not vested with general supervisory power over the district courts.

> "If an exercise of discretion by the district judge be involved this Court may not assert its original jurisdiction to enforce its own judgment, even though the actions of the district judge may have been improvident or otherwise erroneous."

The writ of mandamus will not lie to correct a merely erroneous or voidable order of the trial judge. The action of the trial judge in permitting the case to go to the jury, and later declaring a mistrial when a verdict was not obtained are not orders which the trial court was powerless to enter. If such actions were erroneous, such errors can be corrected on appeal. See Iley v. Hughes, supra.

I agree with the Respondents that the conspiracy question should be met. It is stated in their brief:

> "• • • [T]he Relators relegate the contention of Respondents to a challenge of 'motives' of the individual Board members. This exercise in semantics cannot sweep under the rug the hard fact that Respondents charged a conspiracy under the Constitution and statutes, offered proof in support thereof, and the belief of the trial judge that there was an issue of fact to submit to the jury. Conspiracy, to become an issue of law, must be determined from an evaluation of the facts offered in support thereof. Weighing the facts to determine the necessary quantum of evidence which would warrant submission to a jury is, and must always be, an exercise of judicial discretion."

The Court, in effect, has held that the pleadings must be sufficient to shock the judicial conscience, and that its conscience could only be shocked upon a "showing of conditions comparable in seriousness to that to corruption, fraud, dishonesty or bribery * * *." I cannot conceive of alleged conditions more corrupt in nature than the allegations that the members of the Board have lost sight of their duties as public officials, and have designedly conceived a scheme to destroy not only the good name of the Respondents but their business as well. The Court says this is not the type of action and conduct which would shock its conscience. Not only that, the Court holds that the "case has been fully developed in the trial court and is ripe for judgment." The effect of this order is to deprive the Respondents of the right to amend their pleadings and obtain a ruling on the amended pleadings by the trial court. The conspiracy issue has been eliminated. The Respondents can expect no relief by appealing from the force of the judgment the trial court has been ordered to enter. I presume it would not shock the conscience of the Court in the event the trial court should grant the Respondents a new trial in order to give the parties a fair opportunity to perfect a record from the trial court's ruling on sufficiency of pleadings after having been given an opportunity to amend their pleadings.

Relators' prayers for a writ of mandamus should be denied.

APPENDIX B

Judgment of the Supreme Court of Texas and Order Denying Rehearing

IN THE SUPREME COURT OF TEXAS

AUSTIN

February 8, 1967.

From Dallas County, Fifth District.

No. A-11478

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al.

vs.

ELLIS CARP et al.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Smith dissenting) that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is, therefore, adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that respondents, Ellis Carp, S. J. Rogers and N. Jay Rogers, and their sureties, Ben Rogers

and Victor J. Rogers, pay all costs in this cause expended and incurred in this Court and Court of Civil Appeals; that petitioners, Texas State Board of Examiners in Optometry and the individual members thereof and the North Texas Optometric Society, Inc., have and recover of and from respondents, Ellis Carp, S. J. Rogers and N. Jay Rogers, and their sureties, Ben Rogers and Victor J. Rogers, the costs by them expended and incurred in said Courts, and that this decision be certified to the District Court of Dallas County, Texas, for observance.

IN THE SUPREME COURT OF TEXAS

AUSTIN

March 29, 1967.

From Dallas County, Fifth District.

No. A-11478

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al.

vs.

ELLIS CARP et al.

Respondents' motion for rehearing, filed in the above numbered and entitled cause on February 22, 1967, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX C

State Statute and Regulations Involved

1. Texas Revised Civil Statutes, Article 4556

The Board shall preserve a record of its proceedings in a book kept for that purpose. A record shall be kept showing the name, age, and present legal and mailing address of each applicant for examination, the name and location of the school of optometry from which he holds credentials, and the time devoted to the study and practice of optometry, together with such information as the Board may desire to record. Said record shall also show whether applicants were rejected or licensed and shall be prima facie evidence of all matters therein contained. The Secretary of the Board shall on or before March 1st of each year send a certified copy of said record to the Secretary of State for permanent record. A certified copy of said record with the hand and seal of the Secretary of said Board to the Secretary of State, shall be admitted as evidence in all courts. Every license and annual renewal certificate issued shall be numbered and recorded in a book kept by the Secretary of the Board. The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act. The Board shall have the power to appoint committees from its own membership, the duties of such committees shall be to consider such matters, pertaining to the enforcement of this Act and the regulations promulgated in accordance therewith, as shall be referred to said committees, and they shall make recommendations to the Board with re-

spect thereto. The Board shall have the power to employ the services of stenographers, inspectors, and other necessary assistants in carrying out the provisions of this Act. The Board shall be represented by the Attorney General and the County and District Attorneys of the State. The Board, any committee, or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records and documents to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The Board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain it. The Board shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for an injunction shall be in addition to any other action, proceeding or remedy authorized by law. Before entering upon the discharge of the duties of his office, the Secretary-Treasurer of the Board shall give such bond for the performance of his duties as the Board may require, the premium of which is to be paid from funds in the possession of the Board. The Board shall adopt an official seal and license of suitable design and shall have an office where all of the permanent records shall be kept. Acts 1st C.S. 1921, p. 159; Acts 1939, 46th Leg. p. 360, § 3.

2. Professional Responsibility Rule

In order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship, the following rule is hereby

adopted by the Texas State Board of Examiners in Optometry on the 21st day of December, 1959, to become effective on the 21st day of December, 1959.

Section 1. No optometrist shall:

a. Divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to prevent an optometrist from paying an employee in the regular course of employment, and provided further that it shall not be construed as a violation of this rule for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

b. Divide, share, split or allocate, either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility and then only after the patient paying the fee has full knowledge thereof, provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry.

c. Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names

of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one (1) year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Article 4563, as amended, *Revised Civil Statutes of Texas,* whichever period shall be the longer.

d. Use, cause or allow to be used after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, his name or professional identification, as authorized by Article 4590e, as amended, *Revised Civil Statutes of Texas,* on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

e. Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the

effective date of this rule, to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

f. The requirement of subparagraphs *d* and *e* above that an optometrist be "actually present" in an office, location or place of practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

(1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.

Provided that this rule shall not be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily. The requirement of subparagraphs *d* and *e* above

that an optometrist be "practicing optometry" at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location, or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office, location or place of practice such examinations.

Section 2. The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of Section 1 above shall be considered by the Texas State Board of Examiners in Optometry to constitute prima facie evidence that such optometrist is guilty of violation of Chapter 10, Title 71, as amended, of the *Revised Civil Statutes of Texas,* and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the Board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoin the violation of any of the preceding rules.

Section 3. If any section, subsection, paragraph, subparagraph, sentence, clause, or part of the above provisions shall, for any reason, be held invalid, such decision shall not affect the remaining portions of the above provisions, and it is hereby declared to be the intention of the Texas State Board of Examiners in Optometry to have promulgated and adopted each section, subsection, paragraph, subparagraph, sentence, clause, or part of the above provisions irrespective of the fact that any other section,

subsection, paragraph, subparagraph, sentence, clause, or part of the above provisions may be declared invalid, that is, it is the intention of the said Board that each of the above provisions and portions thereof are severable.

Section 4. All rules, regulations, and administrative interpretations heretofore adopted by the Board are hereby repealed and rescinded insofar as such rules or interpretations, or any of them, or any provision thereof, is, or are inconsistent herewith.

3. Rule Making Procedure Rule

In making rules and regulations for the regulation of the practice of optometry pursuant to Article 4556, *Revised Civil Statutes of Texas,* the board shall prepare and propose such rules and regulations and submit by mail a copy of each such rule and regulation, as well as all other such rules and regulations as may have been proposed and filed with the board, supported by a petition signed by at least twenty-five per cent (25%) of the optometrists licensed by and practicing in the State of Texas, in ballot form to each optometrist licensed by and practicing in the State of Texas for a vote thereon. At the end of thirty (30) days from the time such ballots are mailed, the board shall count the ballots that have been returned, provided that no election shall be valid unless a minimum of fifty-one per cent (51%) of the optometrists licensed by and practicing in the State of Texas shall have voted at the election at which such rule or rules are voted on; and each and all of such rules and regulations that have received two-thirds of the votes cast shall be by said board declared as approved by the profession. The fact that any rule or regulation is approved by the profession itself shall be considered by the board

as prima facie evidence that such rule or regulation is reasonable and necessary for the regulation of the practice of optometry in Texas. No rule or regulation for the regulation of the practice of optometry shall be made by said board that has not received two-thirds of the votes cast in the manner above provided.

4. Advisory Committee Resolution

RESOLVED, that the board appoint a committee to be known as the Optometry Board Advisory Committee for the purpose of considering the regulation of the practice of optometry and recommending to the board what rules and regulations, if any, are necessary for the regulation of the practice of optometry in Texas; that in furtherance of this resolution and in order to appoint a committee representative of all geographical areas and all elements of the profession, the president of the board be, and he is hereby, directed to request each member of the Texas Legislature to recommend an optometrist from his district to serve on said committee.

Proof of Service

I, THURMAN ARNOLD, an attorney of record for Ellis Carp, et al., Appellants herein, certify that on the eleventh day of August, 1967, I served copies of the foregoing Jurisdictional Statement on the Appellees herein by depositing copies of the same in a United States mail box with first class postage prepaid, addressed to Ellis Lyons and Bennett Boskey, 918—16th Street, N.W., Washington, D.C., counsel for Appellees, and with air mail postage prepaid, addressed to Crawford Martin, Attorney General of Texas, Austin, Texas; John Reeves, Assistant Attorney General of Texas, Austin, Texas; Thomas Gee, Austin National Bank Building, Austin, Texas; Charles M. Babb, 1005 Capital National Bank Building, Austin, Texas; and Mark Martin, Fidelity Union Tower Building, Dallas, Texas, counsel for Appellees.

.....

THURMAN ARNOLD